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Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

October Term, 1980

No. ____

United States of America

vs.

Leslie Anderson and Leonard Mooney
Petitioners

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Does the proper construction of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.*, require that the "enterprise" which the defendants are alleged to have influenced have an ascertainable structure which exists for the purpose of maintaining operations directed towards an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering?"

2. If two defendants are jointly indicted, pursuant to Rule 8 (b) Fed.R.Crim.P., for violation of 18 U.S.C. §1962 (d) "racketeering conspiracy", are they entitled to new trials upon other and separate counts after the Court of Appeals finds that the joining count of "racketeering conspiracy" failed to allege a crime?

3. If a defendant is simultaneously tried upon a 18 U.S.C. §1962 (c) "racketeering" indictment which fails to allege a crime and separate and lesser counts of mail fraud and travel act violations, do Rule 8 (a) Fed.R.Crim.P. and due process require a new trial upon the separate and lesser counts when an appellate court reverses the "racketeering" counts for failure to allege a crime?

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No. ____

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vs.

Leslie Anderson and Leonard Mooney
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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Leslie Anderson and Leonard Mooney jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in these cases.

Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit, filed August 7, 1980, and the September 12, 1980 denial of the petitioners' motion for rehearing and suggestion for rehearing en banc are attached as Appendix A, *infra* (pp. 1a - 38a).

Jurisdiction

The judgment of the Court of Appeals was entered August 7, 1980. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 12, 1980. This petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Does the proper construction of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961, *et seq.*, require that the "enterprise" which the defendants are alleged to have influenced have an ascertainable structure which exists for the purpose of maintaining operations directed towards an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering?"

2. If two defendants are jointly indicted, pursuant to Rule 8 (b) Fed.R.Crim.P., for violation of 18 U.S.C. §1962 (d) "racketeering conspiracy", are they entitled to new trials upon other and separate counts after the Court of Appeals finds that the joining count of "racketeering conspiracy" failed to allege a crime?

3. If a defendant is simultaneously tried upon a 18 U.S.C. §1962 (c) "racketeering" indictment which fails to allege a crime and separate and lesser counts of mail fraud and travel act violations, do Rule 8 (a) Fed.R.Crim.P. and due process require a new trial upon the separate and lesser counts when an appellate court reverses the "racketeering" counts for failure to allege a crime?

Federal Statutes, Rules, and Issues Involved

18 U.S.C. §1962 (c) states that it shall be unlawful:

> . . . for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1962 (d) states that "[I]t shall be unlawful for any person to conspire to violate . . . (c) of this section."

18 U.S.C. §1961 (4) provides the definition of "enterprise:"

> 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

The Second, Fifth, Seventh, and Ninth Circuits have held that an "enterprise" need not have any existence in addition to the commission of the predicate acts constituting the "pattern of racketeering activity." The Courts of Appeals for the First and Eighth Circuits have held to the contrary. The conflict between these appellate decisions requires resolution by this Court.

Rule 8 (b), Fed.R.Crim.P. provides that defendants may be jointly indicted (and thus jointly tried):

> . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses . . .

Rule 8 (a), Fed.R.Crim.P. provides that two or more offenses may be charged in the same indictment if they:

> . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14, Fed.R.Crim.P. presents the severance remedy for misjoinder:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires . . .

The First and Sixth Circuits have held that if a 18 U.S.C. §1962 (c) "racketeering" indictment is the result of an erroneous construction of the term "enterprise", the resultant misjoinder of defendants is prejudicial *per se*. The Court of Appeals for the Eighth Circuit has held to the contrary. Only this Court can resolve the conflict between these appellate decisions.

Statement of the Case

On April 2, 1979, in the Eastern District of Arkansas, Leslie Anderson, a former county judge* for Sharp County and County Judge Leonard Mooney of Fulton County were jointly charged in a twenty-eight (28) count indictment. Anderson was charged with fourteen (14) separate counts of mail fraud under 18 U.S.C. §1341, four (4) separate counts of violation of the travel act under 18 U.S.C. §1952, one (1) count of racketeering under 18 U.S.C. §1962 (c), and one (1) count of conspiring to racketeer under 18 U.S.C. §1962 (d). The twenty (20) separate charges involved eight (8) alleged "kickback" and "bogus invoice" transactions. Mooney was charged with ten (10) separate counts of mail fraud under 18 U.S.C. §1341, one (1) count of violation of the travel act under 18 U.S.C. §1952, one (1) count of racketeering under 18 U.S.C. §1962 (c), and one (1) count of conspiring to racketeer under 18 U.S.C. §1962 (d). The thirteen (13) separate charges involved four (4) alleged "kickback" and "bogus invoice" transactions. The government alleged that Paul Baldwin, a culvert salesman selling to counties in northeast Arkansas, paid the separate bribes to Anderson and to Mooney. Of the twelve (12) separate transactions alleged, the government alleged that both Anderson and Mooney were involved together in one (1), an alleged bribe of Anderson by Baldwin. The transaction in which joint participation was alleged provided the foundation for five (5) of the total twenty-six (26) mail fraud and travel act counts charged in the indictment.

Count I of the twenty-eight (28) count indictment charged Anderson and Mooney with "associating" with an

*In Arkansas, the county judge is the county administrator. The position is essentially executive with only vestigial judicial duties.

"enterprise affecting interstate commerce", and "conducting the affairs of the enterprise" through a "pattern of racketeering", in violation of 18 U.S.C. §1962 (c). The "enterprise" alleged was Anderson and Mooney, along with the materials supplier, Paul Baldwin, "associated in fact to defraud . . . Sharp and Fulton Counties." The "pattern of racketeering activity" through which Anderson and Mooney were alleged to have conducted the affairs of the "enterprise" was the total of the twenty-six (26) alleged counts of mail fraud and travel act violations, i.e., the twelve (12) transactions in which the government alleged that Baldwin bribed one defendant or the other in violation of Arkansas law.

Count II of the indictment charged Anderson and Mooney with conspiring in violation of 18 U.S.C. §1962 (d) to do everything that Count I alleged they had done.

Each of the defendants separately attacked both the constitutionality and the specific application of 18 U.S.C. §§1962 (c) and 1962 (d). Each of the defendants separately moved for severance of parties and election of counts within the indictment. All motions regarding 18 U.S.C. §1961, *et seq.*, (RICO) and severance were denied by the trial court.

Anderson and Mooney were jointly tried and convicted on all twenty-eight (28) counts of the indictment. During the government's case in chief, an unspecified prior conviction of Anderson was introduced over the objection of both defendants.

The Court of Appeals for the Eighth Circuit reversed the convictions under Counts I and II for both Anderson and Mooney on the grounds that the association and scheme alleged between Baldwin, Anderson and

Mooney could not constitute an "enterprise", the affairs of which might be conducted in violation of 18 U.S.C. §§1962 (c) and 1962 (d). The Court held that the term "enterprise" as used in 18 U.S.C. §1962 (c), and as defined in 18 U.S.C. §1961 (4), could "encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.' " The Court acknowledged that the holding placed the Eighth Circuit in "direct opposition" to the views of the Second, Fifth, Seventh, and Ninth Circuits." (App. p. 29a).

The Court of Appeals refused, however, to order new trials on the mail fraud and travel act violations, stating that there was "no prejudice from the joint trial procedure." (App. p. 32a). The petition for rehearing, alleging that the defendants were denied a fair trial on the mail fraud and travel act counts because the improperly maintained "racketeering" charges prejudiced the guilt determination process on the other counts, was denied. The Court did not comment in the opinion, nor in the denial of petition for rehearing, upon the opposite result reached by the Sixth Circuit in the only other case, at the time, reversing RICO convictions for the reason that the "enterprise" alleged was outside the statute.

Reasons for Granting the Writ

Petitioners' cases present two different conflicts between the Courts of Appeals for the various circuits in the handling of prosecutions of "racketeering" under 18 U.S.C. §1961, *et seq.*, (RICO). Both conflicts presented are square, and each raises important questions about the

continuation and method of prosecution under Title IX of the Organized Crime Control Act of 1970, the Racketeer Influenced and Corrupt Organizations Act. Professor Blakey, who was at the time of passage, chief counsel for the Senate subcommittee on Criminal Laws and Procedures, contends that RICO has replaced conspiracy as the prosecutor's favorite weapon "not just in organized crime type prosecutions, but in white-collar-type prosecutions as well as in large variety of violent offenses." Blakey & Gettings, *RICO: Evening Up the Odds*, TRIAL, October, 1980. Although the various Courts of Appeals disagree about the legislative history for RICO, they all agree that Congress believed the statutes dealt with the matter of intense national importance. The conflicts in the Courts of Appeals, which are fairly raised in these cases, concern the permissible scope of RICO prosecutions and their affect on separate and lesser crimes alleged in a single indictment.

The first conflict in the circuits concerns the scope of the RICO "enterprise." The Second, Fifth, Seventh, and Ninth Circuit Courts of Appeals have held that the "enterprise", which 18 U.S.C. §1962 (c) makes it unlawful to participate in "through a pattern of racketeering activity", may be an association in fact existing solely for a criminal purpose. Certiorari has been denied in every case in which the Court of Appeals has construed 18 U.S.C. §1962 (c) to include "illegitimate enterprises" within its protected "enterprises." *E.g., United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980). In the cases joined for this petition, the Eighth

Circuit Court of Appeals held that an association in fact could not constitute an "enterprise" under 18 U.S.C. §1962 (c) if its structure existed only for maintaining an economic goal which could not be defined apart from the pattern of racketeering:

> We recognize that this holding places the Eighth Circuit in direct opposition to the views of the Second, Fifth, Seventh, and Ninth Circuits. (App. p. 29a).

The First Circuit Court of Appeals, in *United States v. Turkete*, _____ F.2d _____ (Sept. 23, 1980), apparently unaware of the Eighth Circuit decision, came to the conclusion that the RICO "enterprise" must be "legitimate" to be protected by 18 U.S.C. §1962 (c). The Sixth Circuit, cited by the Eighth as its "sole declared ally", has vacated and set for rehearing en banc, its decision in *United States v. Sutton*, 605 F.2d 260 (1979).

The resolution of the "enterprise" conflict between the circuits will answer many asked and unanswered questions about RICO's scope, because the resolution depends in part upon determining congressional intent. Whether RICO prosecutions are restricted to "organized crime", include the influence or conduct of governmental agencies, incorporate the maintenance of any illegitimate enterprises, or present a new criminal law concept of conspiracy, all turn on this Court's view of the legislative history. The minority position of the First and Eighth Circuits, that the entire thrust of the legislation is to deter and punish the infiltration of legitimate enterprise by those engaged in crime, is supported by the late Senator McClellan, a major author of the legislation. McClellan, *Organized Crime Control Act (S. 30) or Its Critics: Which Threaten Civil Liberties?* 46 Notre Dame Law 55 (1970). The importance of the questions presented by the conflict

over the definition of "enterprise" is well documented in Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837 (1980).

The second conflict in the circuits concerns the affect of an improperly maintained "racketeering" indictment upon the separate and lesser counts in the indictment. Almost inevitably, a RICO indictment involves more than one defendant and separate and lesser counts for the other crimes which are alleged to be the "pattern of racketeering activity." Until the decision in *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) *vacated and submitted for rehearing en banc* April 2, 1980, no Court of Appeals was forced to decide the affect on other counts or people of an indictment for "racketeering" which failed to state a crime. Until that Sixth Circuit decision, no indictment for "racketeering" had been judged insufficient as a matter of law. *United States v. Sutton, supra*, held that if the joinder of defendants was the result of an improperly alleged connection between the defendants, i.e., RICO conspiracy or RICO substantive count, then the misjoinder was "prejudicial per se" under the traditional interpretation of Rule 8 (b) Fed.R.Crim.P. The *Sutton* panel was careful to point out that the question of the validity of the convictions on the separate and lesser counts was one of misjoinder under Rule 8 (b) and not, strictly speaking, severance under Rule 14. Rule 8 (b) misjoinder is prejudicial per se, while the question of severance under Rule 14 is one of the propriety of trial court discretion. The *Sutton* decision relied upon the distinction drawn by this Court in *Schaffer v. United States*, 362 U.S. 511 (1960) that so long as "the initial joinder of the petitioners was permissible" Rule 14 analysis is appropriate when a trial court is faced with a severance decision after it finds a properly alleged conspiracy count to be lacking sufficient evidence. The

recent First Circuit decision of *United States v. Turkete*, _____ F.2d _____ (Sept. 23, 1980) adopts the *Sutton* analysis and result, ordering new and separate trials on the non-RICO counts in the indictment.

The only other Court of Appeals to be faced with the question is the Eighth Circuit in these joined cases. In refusing to order new and separate trials on the non-RICO counts, the Court failed to take congizance of the difference between the prejudice from a misjoinder based upon an allegation of "concert" that is not, in fact, illegal, and the need for severance when the properly alleged concert may, nevertheless, not justify a joint trial. The difference is substantial. Rule 14 analysis, which the Eighth Circuit improperly applied to the instant cases, leaves it within the discretion of the trial court to judge whether the "risk" of prejudice from evidence spillover from one defendant to another has become a sufficient "reality" so that properly joined defendants should be severed for trial. It requires the trial court to balance the judicial economy of a single trial for defendants charged with joint *illegal* activity against the prejudice which will be visited upon one defendant by evidence against another. So long as the trial court does not believe the joint trial will cause defendant number 1 to be convicted by evidence against defendant number 2, severance is not required. Rule 8 (b) analysis, on the other hand, involves no individual case balance. The judicial economy of joint trials is outweighed, as a matter of law—and thus, the Rule, by the prejudice to all defendants of the implication of joint *illegal* action by a joint trial when no joint *illegal* action is charged. The instant cases present a perfect example of the difference between the Rule 14 approach of the Eighth Circuit and the Rule 8 (b) approach of the First and Sixth Circuits. Paul Baldwin is alleged to have bribed a number of county administrators in northeast

Arkansas by paying kickbacks and bogus invoices for materials. It is alleged that defendant Mooney was so paid in Fulton County. It is alleged that defenant Anderson was so paid in Sharp County. Paul Baldwin is alleged to have paid off in both counties—separately. The RICO count, which the Court of Appeals has said failed to allege an illegal act, alleged that Anderson, Mooney, and Baldwin were engaged together in a separate illegality of concert. There is no way to determine if the convictions on all counts came because the jury was convinced of illegal concert by the similarity of Baldwin's activity toward each defendant, or if they resulted from consideration of the individual action of each defendant. The primary prejudice to each defendant is not the evidence spillover from defendant number 1 to defendant number 2. The primary prejudice is the beguiling, but unwarranted in law, impression that the coincidence of Baldwin's alleged separate activity towards two individuals is probative of either one's individual liability for a separate crime.

Rule 14 prejudice results not from the joinder, but from the evidence spillover which *might* result from the joinder. Rule 8 (b) prejudice results directly from the factual impression of joint liability upon separate acts when there is no such liability in law.

A similar problem exists under Rule 8 (a) Fed.R.Crim.P. when the RICO offenses are joined in one indictment with separate and lesser mail fraud and travel act violations. Given that the RICO count failed to allege a crime, did it, nevertheless, influence the guilt determination process for the joined counts of separate "predicate" crimes? Rule 14 severance is of no help in answering whether there is prejudice from the joinder of offenses, nor does it provide a remedy for the prejudice. The prejudice to

the defendants does not occur from joinder of RICO and non-RICO counts if the RICO count alleges a crime, it arises if the "racketeering" charge is joined, takes the major attention of counsel, court, and jury, and was invalid from the beginning. Because *Sutton* was decided on severance, as these cases should have been, counsel is unable to find any authority directly addressing the question. The stigma attendant the term "racketeer", see *United States v. Vargas*, 615 F.2d 952 (2d Cir. 1980) and the unique construct of 18 U.S.C. §1962 (c), wherein the alleged crimes of the "pattern of racketeering activity" are a necessary predicate for the RICO conviction, combine to produce immeasurable prejudice if the RICO charge is not justified. If the government can charge and try a "racketeer", gain a conviction on another count, and lose the "racketeer" (RICO) count on appeal because the allegations did not constitute a crime, the guilt determination process on the non-RICO count is forever insulated from examination to reveal whether it was the result of evidence or of the government's allegation that the defendant is a "racketeer." If due process would prohibit the government from prosecuting an individual for a crime like bribery, and during the trial continually refer to the defendant as a "crook", "racketeer", or any other term of general approbation, it ought to prevent the government from reaching the same result by maintaining a charge of "racketeering" which is not within the definition of the statute. The issue is not the intent of the government so much as it is the affect upon the jury.

The importance of the conflict between the circuits on the question of the prejudice from misjoinder will be most apparent if, for whatever reason, this Court should fail to grant certiorari in these cases. The result will be that in at least two circuits—and probably three—a RICO

indictment which fails to allege a proper enterprise will be struck down by the appellate court. In one circuit the jointly indicted defendants will receive the new and separate trials, which under Rule 8 (b) Fed.R.Crim.P., they had a right to in the first place. In the other circuit, those defendants will go to jail on the non-RICO counts without ever knowing if the jury put them in jail because it believed they did the separate acts or because together they must have been "racketeers."

The instant cases represent an important division among the various Courts of Appeals as to the scope of a major federal criminal statute and a significant disagreement as to the proper test in the federal system when defendants or offenses are jointly tried upon an indictment in which they were misjoined at the outset, the "joining" offense being non-existent in the law. The Eighth Circuit Court of Appeals was correct in determining that the 18 U.S.C. §1962 (c) "enterprise" could not be so broadly construed as the Second, Fourth, Seventh, and Ninth Circuits allowed, and could not include the "enterprise" with which Anderson and Mooney were alleged to have "associated." The Eighth Circuit Court of Appeals was wrong when it concluded, contrary to the decisions in the First and Sixth Circuits, that the initially improper joinder did not prejudice the defendants as a matter of law with respect to the separate counts.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1809
No. 79-1827

United States of America,	*	
	*	
Appellee,	*	Appeals from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Arkansas
Leslie Anderson	*	
and	*	
Leonard Mooney,	*	
	*	
Appellants.	*	

Submitted: February 11, 1980
Filed: August 7, 1980

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and STEPHENSON, Circuit Judge.

GIBSON, Senior Circuit Judge.

Leslie Anderson and Leonard Mooney appeal their convictions pursuant to jury verdicts finding them guilty on all counts in which they were named of a twenty-eight-count

indictment alleging that, while county judges in Arkansas, Anderson and Mooney devised a scheme to defraud and to obtain money from their county treasuries by means of false and fraudulent pretenses, representations, and promises.

Counts I and II of the indictment charged violations of Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, §901 (a), popularly known as the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962 (c) and (d) (1976). Counts V, VI, IX, and XVI charged violations of 18 U.S.C. §§2 and 1952 (1976) by interstate travel in aid of the unlawful activity of public servant bribery in violation of Arkansas law, Ark. Stat. Ann. §41-2703 (1977). The remaining counts of the indictment charged mail fraud in violation of 18 U.S.C. §1341 (1976).

The District Court [1] sentenced defendant Anderson to one year's imprisonment on Count I, to run concurrently with one-year sentences on Counts II, III, and V. Also on Count V, the court imposed a fine of $5,000. The court suspended imposition of sentence on the remaining counts in which Anderson was named and placed him on probation for a period of two years, to run consecutively to the term of imprisonment imposed on Count I.

The District Court sentenced defendant Mooney to six months' imprisonment on Count I, to run concurrently with six-month sentences on Counts II, XVI, and XVII. Also on Count XVI, the court imposed a fine of $7,000. On all remaining counts in which Mooney was named, the court suspended imposition of sentence and placed him on

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1. The Honorable Elsijane Trimble Roy, United States District Judge, Eastern District of Arkansas.

probation for a term of two years, to run consecutively to the term of imprisonment on Count I.

On appeal, defendants jointly assert six errors on the part of the District Court: (1) permitting the application of RICO; (2) failing to grant severance of the trial; (3) allowing the Government to introduce testimony regarding Anderson's previous felony conviction; (4) forcing the defense to reveal the names of the prospective defense witnesses during the voir dire; (5) improper rulings regarding the selection of jurors; and (6) not granting a change in venue.

We agree with the defendants that the District Court erred in permitting RICO to be applied to the activities of defendants charged in the indictment, but find the remaining assertions of error meritless. We therefore reverse the convictions on Counts I and II and affirm the convictions on the remaining counts. [2]

2.

The Government has not raised the potential application of the Concurrent Sentence Doctrine to this case. *See Hirabayashi v. United States*, 320 U.S. 81, 105 (1943). We note that the District Court imposed sentences to run concurrently with the sentences on the RICO counts. This creates a situation where the reversal of the RICO counts does not affect the sentences of the defendants. Nevertheless, we consider it necessary to review the convictions on the RICO counts, even though we affirm the convictions on the remaining counts, because of the possible stigma stemming from the connotations surrounding the offense of "racketeering." *See United States v. Vargas*, 615 F.2d 952, 960 (2d Cir. 1980); Note, *The Federal Concurrent Sentence Doctrine*, 70 COLUMBIA L. REV. 1099 (1970). We do not find it necessary to remand to the District Court for a new trial or resentencing. The evidence adduced at trial was relevant to the non-RICO counts, and there is no indication that the court in imposing sentences on these counts was in any way influenced by the disposition of the RICO counts.

I. Facts

At all times relevant to the indictment, Anderson served as the county judge for Sharp County, Arkansas, and Mooney served as the county judge for Fulton County, Arkansas. In these capacities they acted as administrators for the counties. Among their duties they managed the fiscal functions of their respective counties by approving and authorizing payment of bills and accounts. They were not judicial officers. Paul Baldwin, having already been convicted of paying bribes and kickbacks to county judges, acted as the Government's principal witness during the trial. According to his testimony, he operated ostensibly as a salesman of culverts, grader blades, oil, creosote, and other similar items. He sold his wares to county judges in Arkansas and county commissioners in other states. In the event he sold merchandise to one of these customers, he usually wrote out a sales slip setting forth the items to be shipped and the price. He would charge, on the sales slip, the list price, then rebate personally to the purchasing agent ten percent of the net amount of the price shown on the sales slip.[3] Sometimes he entered into a prior arrangement with the purchasing agent that no merchandise would be shipped. They would prepare a bogus voucher which would have the same documentation as a bona fide voucher, but he would give the purchasing agent fifty percent of the net amount instead of ten. The purchasing agent would sign for the goods at the time the voucher was prepared.

Baldwin testified that he had dealt with both Anderson and Mooney in this manner. Both defendants took the stand and denied having ever taken a bribe from

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3. The net amount did not include state taxes.

Baldwin. They admitted having placed orders with Baldwin and having approved payment on the orders, but contended that the business dealings had always been legitimate. Pursuant to the alleged scheme, by the use of purely bogus invoices the citizens of Sharp County were defrauded of $4,842.25, and the citizens of Fulton County of $7,179.60.

II. RICO Counts

Appellants have presented a tangle of arguments challenging the application of RICO, 18 U.S.C. §1962, to the facts of this case as alleged in the indictment. We address only the issue of the statutory interpretation of the term "enterprise" as used in RICO. Since we find that the RICO counts as charged in the indictment cannot stand under the definition of the term "enterprise" as it is used in the RICO statute, we find it unnecessary to decide the other issues raised in connection with RICO.

Count I of the indictment charges violation of 18 U.S.C. §1962 (c), alleging that

> LESLIE ANDERSON and LEONARD MOONEY were persons associated with an enterprise engaged in, and the activities of which affected, interstate commerce, namely each of the said defendants and Paul A. Baldwin were associated in fact to defraud, and to obtain money by means of false and fraudulent pretenses, representations and promises from Sharp and Fulton Counties, Arkansas, and the people of said counties, and the said defendants, LESLIE ANDERSON and LEONARD MOONEY, did knowingly and willfully conduct and participate directly and indirectly in the conducting of such enterprise's affairs through a pattern of racketeering activity as defined in Title 18, United States Code, Section 1961, * * *.

The pattern of racketeering activity is described in thirty-two subsequent paragraphs alleging separate violations of Arkansas and Federal law. All activity charged as "the pattern of racketeering" pertains to the scheme to defraud the two counties by the judges' agreeing with Baldwin to prepare and submit bogus invoices and to approve payment for them, knowing that the merchandise would never be received by the counties.

Count II of the indictment charges violation of 18 U.S.C. §1962 (c) and (d), alleging that

> LESLIE ANDERSON and LEONARD MOONEY, defendants herein, being associated with an enterprise engaged in and whose activities affect interstate commerce, as defined in Section 1961 of Title 18, United States Code, that is the association in fact with Paul A. Baldwin, d/b/a The "Lisco" Company, did knowingly and willfully conspire, confederate and agree together and with each other, to conduct and participate in, directly and indirectly, conduct of subject enterprise's affairs, through a pattern of racketeering activity * * *.

All events allegedly constituting the pattern of racketeering activity, as well as those alleged as the overt

acts in furtherance of the conspiracy, pertain to the scheme to defraud charged in Count I. [4]

This is the first time this circuit has confronted the problem of defining the scope of RICO. Several other courts have had occasion to address this issue, and have tortuously developed a history of case law construing the complicated statutory language. This history focuses primarily upon the terms "enterprise" and "pattern of racketeering activity." A close examination of the statutory language utilizing these terms is necessary.

Title 18 U.S.C., section 1962, provides in relevant part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

4.

Although the wording of Count II of the indictment, "the association in fact with Paul A. Baldwin, d/b/a The 'Lisco' Company," does not seem clearly to define the relevant "enterprise," the arguments of the defendants and the Government suggest that they understand that the "enterprise" that charged by this is meant to be substantially the same as that charged in Count I. We accept this characterization. Therefore, we do not address the issue of whether Paul A. Baldwin, doing business as the Lisco Company, by itself would constitute an "enterprise" within the definition in RICO. The case does not appear to have been presented to the jury on this basis, and, if it had been, the question of whether defendants were sufficiently connected with Baldwin's business to be considered "associated with" it probably would have been hotly contested. We must restrict our analysis to the case as it was conceived in the lower court. "Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently." *United States v. Carman*, 577 F.2d 556, 568 (9th Cir. 1978).

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

The definition of "enterprise" as used in RICO appears in section 1961 (4): " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Section 1961 also sets forth definitions of "racketeering activity" [5] and "pattern of racketeering activity. [6]

5.
18 U.S.C. §1961 (1) states:

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under * * * title 18 United States Code [§§201, 471, 472, 473, 659, 664, 891-94, 1084, 1341, 1343, 1503, 1510, 1511, 1951, 1952, 1953, 1954, 1955, 2314, 2315, 2421-24], (C) any act which is indictable under title 29, United States Code, section 186 * * * or section 501 (c) * * *, or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States[.]

6.
18 U.S.C. §1961 (5) states:

> (5) "pattern of racketeering activity" requires at least two acts of racketeeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

The scope of the term "enterprise" was first questioned in a federal court of appeals in *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Parness*, the Second Circuit held that a foreign corporation fell within the definition of "enterprise" and that the defendant's acquisition of a foreign corporation, with funds derived from criminal activity, fell within the ambit of RICO, 18 U.S.C. §1962 (a). In reaching this result, the court stated:

> "[E]nterprise" is defined in section 1961 (4) to include "any . . . corporation." On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed.
>
> *Id.* at 439.

This language regarding the congressional intent for broad construction of the term "enterprise" was quickly adopted by the Seventh Circuit in a substantially different context. In *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), the Seventh Circuit found that a broad construction of the term "enterprise" required that an illegal gambling business fit within this category.[7] The court rejected the argument that the term included only legitimate operations, and found that any association of persons, regardless of the purpose for which organized, would fall within the meaning of the term. The court relied

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7. The *Cappetto* court reached this conclusion in the context of a civil case. The Government had not charged criminal violation of section 1962; it sought only civil remedies pursuant to 18 U.S.C. §1964 (1976).

upon legislative history to support this conclusion. *Id.* (quoting Sen. Rep. No. 91-617 at 72, 73 (1969)). However, the cited history did not in fact apply to RICO but referred only to Title VIII of the Organized Crime Control Act, 18 U.S.C. §1955 (1976), dealing with the prohibition of illegal gambling businesses.

A broad construction of the term "enterprise" became more firmly entrenched and more expansive as more courts addressed the issue of the scope of RICO and built a body of precedent relying upon *Parness* and *Cappetto.* [8] *See, e.g., United States v. Aleman,* 609 F.2d 298, 304-05 (7th Cir. 1979), *cert. denied,* _____ U.S. _____, 63 L.Ed.2d 780 (1980);*United States v. Grzywacz,* 603 F.2d 682, 686-87 & n.6 (7th Cir. 1979), *cert. denied,* 48 U.S.L.W. 3733 (1980); *United States v. Rone,* 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied,* _____ U.S. _____ 63 L.Ed.2d 780 (1980); *United States v. Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978); *United States v. Swiderski,* 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 933 (1979); *United States v. Brown,* 555 F.2d 407, 416 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978); *United States v. Forsythe,* 560 F.2d 1127, 1135-36 (3d Cir. 1977); *United States v.*

8.

RICO initially was not very popular among prosecutors. The reluctance to use it no doubt stemmed in part from its complexity and the fear of unleashing a Pandora's box of statutory interpretation problems. Beginning in 1975, the United States Justice Department Task Force specializing in RICO toured the country, lecturing to United States Attorneys and their assistants on the use of RICO. Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes,* 69 J. CRIM. L. & CRIMINOLOGY 1, 3 n.21 (1978). After this promotional campaign, RICO has grown in popularity. Broad interpretation and simplistic resolution of the complicated statutory language pose the danger of enhancing this popularity beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power.

Frumento, 563 F.2d 1083, 1089-91 & n.17 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *United States v. McLaurin*, 557 F.2d 1064, 1073 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Hawes*, 529 F.2d 472, 479-80 (5th Cir. 1976); *United States v. Morris*, 532 F.2d 436, 441-42 (5th Cir. 1976). This trend toward an expansive definition has not proceeded without criticism, *see e.g., United States v. Aleman*, 609 F.2d 298, 311 (7th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980) (Swygert, J., dissenting); *United States v. Rone*, 598 F.2d 564, 573-74 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980) (Ely, J., dissenting); *United States v. Grzywacz*, 603 F.2d 682, 690-91 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3733 (1980) (Swygert, J., dissenting); *United States v. Altese*, 542 F.2d 104, 107-110 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (Van Graafeiland, J., dissenting); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 892-93 (1980); Atkinson, "*Racketeer Influenced and Corrupt Organizations,*" *18 U.S.C. §§1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978); Note, Elliott v. United States: *Conspiracy Law and the Judicial Pursuit of Organized Crime through RICO*, 65 U. VA. L. REV. 109 (1979); Note, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in Its Interpretation*, 27 De PAUL L. REV. 89, 105, 112 (1977); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"*, 124 U. PA. L. REV. 192, 201-06 (1975), and some courts have not followed the trend toward broadly expansive interpretation, *see, e.g., United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *submitted for rehearing en banc* April 2, 1980; *United States v. Mandel*, 415 F. Supp. 997, 1020-22 (D. Md. 1976) (pretrial order, not alleged as

error on appeal); *United States v. Moeller*, 402 F. Supp. 49, 58-61 (D. Conn. 1975) (implicitly overruled by *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977)).

Some defendants have challenged the constitutionality of RICO on the grounds of vagueness and double jeopardy, but no court yet has found the Act unconstitutional.[9] Other challenges focus upon the statutory definitions of the terms "enterprise" and "pattern of racketeering activity." Questions regarding the latter term have frequently related to defining the relationships necessary between the predicate acts and between the acts and the enterprise. Aside from the *Parness* case, involving the distinction between foreign and domestic corporations, challenges to the scope of the term "enterprise" have generally focused on the questions of whether it includes

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9.

United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), was one of the earliest federal appellate decisions rejecting constitutional challenges to RICO. The "enterprises" charged in the indictment against the *Campanale* defendants were the "Vernon Loading and Unloading Company, Inc., Pronto Loading and Unloading Company, Inc., and Local 626 [a union]." *Id.* at 357 n.11. The court considered the scope of the term "enterprise" only in one sentence wherein it found that "appellants' contentions that the statute does not apply to a small business enterprise such as Pronto is without merit." *Id.* at 364. Nevertheless, courts advocating an expansive definition of the term "enterprise" frequently cite *Campanale* for support. Sometimes the citation is more than misleading as *Campanale* simply cannot be read to stand for the proposition for which it is cited. *E.g.*, *United States v. Aleman*, *supra*, 609 F.2d at 305 (citing *Campanale* for the proposition that "the term 'enterprise' had a very broad meaning and was not restricted to legitimate business enterprises"); *United States v. Grzywacz*, *supra*, 603 F.2d at 686 n.6 (citing the holding of *Campanale* as "applied the statute to illegal enterprises, reasoning that a broad interpretation was necessary to achieve the remedial objectives of the enactment"); *United States v. Altese*, *supra*, 542 F.2d at 107 (citing *Campanale* for the conclusion that illegal enterprises are included).

illegitimate as well as legitimate associations and public as well as private organizations. Defendants Anderson and Mooney argue that the term "enterprise" does not encompass an illegal association that is proved only by facts which also establish the predicate acts of constituting the "pattern of racketeering activity." This is the narrow issue we address. [10]

In statutory interpretation we first look to the language of the statute itself. The RICO language is particularly complicated, and the various elements of the offense intricately interrelate. Because we share the general consensus that RICO is a carefully crafted piece of legislation, *see Iannelli v. United States*, 420 U.S. 770, 789 (1975), we find that the structural interrelationship of the elements of the offense, as set forth in the statute, control the disposition of this case. The term "enterprise" must

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10.

The facts of this case suggest that both Anderson and Mooney might have been charged, as persons employed by Sharp County and Fulton County, respectively, with conducting the affairs of those counties through a pattern of racketeering activity. This formulation of the charge would have avoided the question which we address today, in that the county governments necessarily constitute "enterprises" separate and distinct from the pattern of racketeering activity. Nevertheless, we would still probably be confronted with the issue of defining the scope of the term "enterprise" because of the unsettled argument that the term cannot encompass government agencies or offices. *See* Atkinson, *supra*, 69 J. CRIM. L. & CRIMINOLOGY 1, 13-14 (1978); Bradley, *supra*, 65 IOWA L. REV. 837, 858-61 (1980). The case as presented for review, however, does not present this issue and therefore we make no comment on its resolution. We note, however, that in the recent case of *United States v. Gillock*, No. 78-1455 (U.S. Sup. Ct. Mar. 18, 1980), the defendant was charged with being associated with the enterprise of the Tennessee General Assembly and engaging in the affairs of that enterprise through a pattern of racketeering activity. On appeal from a pretrial suppression of evidence order, the United States Supreme Court appeared to accept the position that the indictment charged violations of federal criminal statutes.

signify an association that is substantially different from the acts which form the "pattern of racketeering activity." A contrary interpretation would alter the essential elements of the offense as determined by Congress. [11]

Examining the language of the statute, the Government preliminarily argues that the use of the word "any" in section 1962 prescribes the broadest possible interpretation of the word "enterprise." Congress, however, thought it necessary explicitly to include a definition of the word "enterprise" in section 1961 (4). *See United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (Van Graafeiland, J., dissenting). Use of the word "any" signifies that all enterprises fitting within this definition can be predicate enterprises for a violation of section 1962 as long as they

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11.

At least one court joining the trend of expansive construction of the "enterprise" term has even discarded the generally accepted view that the goal of statutory interpretation is to divine the intent of Congress. In *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979), the court listed "Congressional intent" as merely one factor to be relied upon in construing a statute and stated that

> while Congress may desire that a particular entity be accorded a separate legal status, the Court is not bound by that implied desire. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. *United States v. Amer. Trucking Ass'ns, Inc.*, 310 U.S. 534, 544, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

Id. at 138 n.3. Although we acknowledge and accept our duty to determine the meaning of RICO as applied to the controversy before us, we perceive our function as limited to ascertaining the meaning of the statute that Congress intended. Expanding the scope of RICO beyond congressional intent is judicial legislation violative of the separation of powers doctrine established in the United States Constitution.

also have the requisite nexus with interstate or foreign commerce.

The syntactical form of the section 1961 (4) definition warrants application of the traditional maxim of statutory construction, *noscitur a sociis.* The definition sets forth two conjunctive phrases, listing the types of groups included in the definition of "enterprise." The first phrase describes legal entities: "individual, partnership, corporation, association, or other legal entity." The second phrase refers to non-legal entities: "any union or group of individuals associated in fact although not a legal entity." In this case, the enterprise charged in the indictment allegedly falls within the category of a "group of individuals associated in fact although not a legal entity." We find that these general words are *ejusdem generis* to the previous words defining types of groups which can constitute an enterprise. The meaning of the general phrase, "group of individuals associated in fact although not a legal entity," is thus controlled by the preceding specifically enumerated examples.

Although the *ejusdem generis* rule is not applicable when the context of the statutory provision manifests a contrary intention, the wording and composition of RICO, as well as the legislative history and motivating policies of the Act, strongly imply the applicability of the rule. We also must turn to these factors in order to ascertain the pertinent aspects of commonality among the enumerated examples of an enterprise. We first probe more deeply into the statutory language and structure.

Section 1962 divides into four subsections. The first three subsections establish three new offenses. [12] Subsection (a) prohibits investing funds acquired from a pattern of racketeering activity to acquire, establish or operate an interstate enterprise. Subsection (b) prohibits acquiring or maintaining an interest in an interstate enterprise through a pattern or racketeering activity or through collection of an unlawful debt. Subsection (c), the substantive offense charged against Anderson and Mooney, prohibits any person employed by or associated with an interstate enterprise from conducting the affairs of that enterprise through a pattern of racketeering activity. The last subsection (d), renders it unlawful to conspire to violate the substantive offenses created in subsections (a), (b), and (c).

Aside from the "enterprise" element, the critical element common to the RICO substantive offenses is the "pattern of racketeering activity." [13] With subsection (c),

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12.

The *Cappetto* court, in establishing the initial precedent for the construction of "enterprise" applied by the Government in this case, distinguished between the use of the term in subsection (a) and its use in subsections (b) and (c). It acknowledged that subsection (a) was intended "to protect 'legitimate business' against infiltration by racketeers," but concluded that the use of the term "enterprise" in subsections (b) and (c) was not similarly limited. 502 F.2d at 1358. Congress, however, employed the identical term in all three subsections, and defined the term in section 1961 without differentiation according to the provision in which it appeared. Uniform definition thus appears more consistent with legislative intent.

13.

With subsections (b) and (c), consideration must also be given to the requirement that the defendant operate "through" a pattern of racketeering activity. This element practically vanishes along with the enterprise element whenever the enterprise is defined as the association to commit the racketeering activity, but it can pose substantive limitations on prosecutorial zeal in the setting of infiltration of legitimate business. *See United States v. Mandel*, 591 F.2d 1347, 1375-76 (4th Cir. 1979), *cert. denied*, _____ U.S. _____, 64 L.Ed.2d 236 (1980); *United States v. Nerone*, 563 F.2d 836, 850-52 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

an overly broad construction of the term "enterprise" can render that element of the offense interchangeable with the "pattern of racketeering" element. Thus, following the universal rule of construction, expounded in BROOM'S LEGAL MAXIMUM 569* and recognized in *United States v. Menasche*, 348 U.S. 528, 539-39 (1955), that courts should give effect to all the words of a statute in order to discover the true intention of the legislature, the Government's interpretation of the phrase "group of individuals associated in fact" appears contrary to legislative intent.

The definition of "pattern of racketeering activity" provided in section 1961(5) merely "requires at least two acts of racketeering activity." [14] Since the term "racketeering activity" is defined simply by listing particular offenses. [15] Questions have arisen concerning the nature of the relationship between the two predicate crimes. Although the ordinary and natural meaning of the phrase "pattern of racketeering activity" would seem to require that the predicate acts relate in some manner, section 1961(5)'s requirement of the commisson of two of the predicate crimes has been held to be clear on its face, and no further evidence has been held necessary to establish a pattern. *See United States v. Weisman*, _____, F.2d _____, 27 Cr.L. 2120, 2121 (2d Cir. April 4, 1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980); *United States v. Elliott*, 571 F.2d 880, 899 & n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *but see United States v.*

14.
See note 5, *supra*.

15.
See note 4, *supra*.

White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974). To ensure that the predicate acts possess some degree of interrelationship, some courts have used the "enterprise" element to establsih a coherent crime by holding that the only relationship between the predicate crimes necessary for a section 1962 violation is that they must both relate to the same enterprise. *See United States v. Weisman, supra; United States v. Elliott, supra.* Thus the "enterprise" element stands as the focal point of the offense.

This use of the "enterprise" element to provide a relationship between the two predicate crimes aids to contain the prohibitions of RICO rather than expand them to cover purely sporadic criminal activity. This result of the statutory structure does not appeal serendipitous, but rather seems to be the product of careful planning. *See* McClellan, *Organized Crime Control Act (S. 30) or Its Critics: Which Threaten Civil Liberties?*, 46 NOTRE DAME LAW. 55, 144 (1970). [16]

Elimination of the "enterprise" element of the offense would pose difficult problems relating to the fifth amendment's guarantee against double jeopardy. The "enterprise" element provides an essential ingredient in the constitutionality of the composition and structure of a section 1962(c) offense. Because a defendant may be separately prosecuted for the two predicate crimes, *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980); *United*

16.

Senator McClellan quoted from the Senate Committee's report: "The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."

States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980), only by requiring proof of an "enterprise" that engages in or has activities affecting interstate or foreign commerce does section 1962(c) require proof of a fact other than facts required to prove the predicate crimes.[17] *See United States v. Solano*, 695 F.2d 1141, 1143-45 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 62 L.Ed.2d 652 (1980); *United States v. Smith*, 574 F.2d 308, 310-11 (5th Cir.), *Cert. denied*, 439 U.S. 931 (1978).

17.

But see United States v. Rone, supra, 598 F.2d at 571, wherein the court conceded that: "If the RICO §1962 (c) charge was based solely on the two extortions, there might be problems under *Blockburger* [284 U.S. 299 (1932)]." To extricate itself from this dilemma the court found that the Government had also proved three other crimes for which the defendants were not separately penalized, but which could serve as predicate acts pursuant to 18 U.S.C. §1961 (1). Thus the court held that "[t]here is sufficient basis for the §1962 (c) conviction even if the two extortion charges were stricken from the RICO charge." *Id.*

The *Rone* court then proceeded to explain that "[t]he Government is not required to make an election between a conviction under RICO, or prosecuting the predicate crimes only," *Id.*, because "Congress clearly intended the Act to provide for new penal prohibitions and enhanced sanctions," *id.* at 572.

One conclusion to be drawn from this type of analysis, when the "enterprise" element is satisfied by showing an association to commit the predicate crimes, is that Congress designed the RICO offenses as a special recidivist type statute. Aside from the double jeopardy conflicts this would entail, we find nothing in the language, structure, or history of the Act to imply that in enacting section 1962 (c) Congress was attempting to enhance the punishment of offenders merely because they commit more than one of the predicate crimes. In the Organized Crime Control Act, Congress addressed the subject to recidivism solely in Title X, providing for the treatment of certain persons as special offenders. 18 U.S.C. §§3575-78 (1970). *See also* McClellan, *supra*, 46 NOTRE DAME LAW. at 159-61.

The definition of "pattern of racketeering activity" can aid construction of the term "enterprise" by examining the nature of the types of offenses chosen by Congress to be listed as "racketeering activity." The offenses chosen reflect an economic orientation, reinforcing the view that Congress intended RICO to aim at the target or organized crime's infiltration of the American economy.

The best explanation for the selection of the particular crimes chosen to serve as predicate acts is provided by Senator McClellan, a co-sponsor of the Act. In a law review article elaborating upon the purpose and coverage of the Organized Crime Control Act, he stated:

> Since the purpose of Title IX is economic, it would be pointless surplusage for it to cover crimes which are not adapted to commercial exploitation. This is why the particular offenses which are well-suited for use to infiltrate a legitimate organization were listed in a section defining one of the substantive elements of Title IX.

McClellan, *supra*, 46 NOTRE DAME LAW. at 161-62 (footnote omitted).

Congress recognized that organized crime, in striving toward financial gain, poses a special threat of lawlessness and violence while it undermines the free market system of our economy. As part of the new weapon to combat this problem, Congress designed novel civil remedial provisions. 18 U.S.C. §1964. These innovations, patterned after the antitrust laws, permit a court to issue civil orders to prevent and restrain violations of section 1962. An analysis of the civil purpose of RICO leads to the conclusion that:

> Title IX is designed to maintain the integrity of business enterprises supplying lawful public needs. Congress may decide eventually to extend the use of civil remedies to combat more indirect economic effects of criminal activity, unrelated to particular business enterprises. But it has not yet done so under Title IX.

Note, *supra*, U. PA. L. REV. at 222 (footnote omitted).

The enterprise charged in the Anderson and Mooney indictment assumes that organizations formed solely for illicit purposes and having no legitimate business structure or connection fall within RICO's definition of an enterprise. This permits proof of the enterprise element by evidence indicating a simple association to commit the pattern of racketeering activity. Thus the Fifth Circuit found that RICO has displaced traditional precepts concerning concerted criminal activity, and freed the Government from the strictures of traditional conspiracy doctrine. [18] *United States v. Elliott*, 571 F.2d 880, 900 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). It found that "[t]he 'enterprise conspiracy' is a legislative innovation in the realm of individual liability for group crime." *Id.* at 903. Using this same approach, the Seventh Circuit found that

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18.
Professor Bradley summarized the Fifth Circuit's holding thusly:

> The *Elliott* court created two new federal crimes—a subsection 1962(c) RICO violation and a subsection 1962(d) RICO conspiracy—from nothing more than a series of simple statutory violations. The element of agreement, necessary to distinguish the conspiracy charge from the substantive offense, is missing. Proof of the substantive offense automatically makes out a conspiracy, according to the court, because one of the elements of the substantive offense, the pattern, satisfies the agreement element of the conspiracy.

Bradley, *supra*, 65 IOWA L. REV. at 879 (footnote omitted).

three home robberies could provide the basis for a RICO violation. The enterprise charged was that of a group of individuals associated to commit the robberies, and the defendants conducted the affairs of this enterprise through a pattern of racketeering activity, namely, the commission of the robberies. *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980).

Congress' inclusion of subsection (d) implies that it did not intend to create a separate species of conspiracy law by including in its definition of the term "enterprise" a "group of individuals associated in fact." It indicates that Congress intended to establish two distinctly separate offenses in subsections (c) and (d). *Cf. United States v. Ohlson*, 552 F.2d 1347, 1349 (9th Cir. 1977) (discussing Wharton's Rule). If a simple criminal conspiracy to commit the predicate crimes were to fulfill the "enterprise" element of a section 1962(c) violation, then a conspiracy to commit a 1962(c) violation would be defined as when a person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts. The awkwardness and duplication inherent in the structure of this articulation of the offense should be sufficient to suggest that we search for an alternate interpretation.

We find nothing in the statutory scheme to suggest that Congress intended to discard the traditional legal precepts applied to concerted criminal activity, or that Congress intended to expand federal jurisdiction to this extent. *See Bradley, supra*, 65 IOWA L. REV. at 878-79; Note, *surpa*, 65 VA. L. REV. 109 (1979). The structure of RICO reveals a specific orientation that does not encompass radical expansion of federal conspiracy law.

In the case at bar, the Government proved the enterprise element of the offense solely by evidence indicating an association to commit the pattern of racketeering activity. This interpretation of the statute effectively eliminated the enterprise element of the offense. We cannot conclude that Congress lightly regarded this element of the offense and intentionally provided for the facile circumvention of the need to prove it. Congress included a separate subsection directed to the prohibition of conspiracy (subsection (d) of 1962) and the indictment separately charged Anderson and Mooney for violating this provision. The difference between being associated with an association to commit a pattern of racketeering activity and an agreement to associate with an association to commit a pattern of racketeering activity is difficult to define. It is unlikely that Congress intended RICO to be this elusive. The statutory language is designed in a complicated manner to address the specific object of its intent. The charge against Anderson and Mooney does not fit within this design.

Congress stated in section 904 of Pub. L. 91-452, 84 Stat. 947 (1970) that RICO "shall be liberally construed to effectuate its remedial purposes." Courts favoring an expansive definition of "enterprise" have placed great reliance on this statement. *See, e.g., United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). The extent of judicial deference that should be accorded this remark stands unclear. Due process requires that criminal laws be written to give fair

notice of the conduct they prohibit.[19] *United States v. Culbert*, 435 U.S. 371 (1978). Also, the principle of statutory construction, referred to as "the rule of lenity," requires resolving ambiguities in penal statutes in favor of lenity. *Bifulco v. United, States*, 48 U.S.L.W. 4734, 4736 (U.S. Sup. Ct. June 16, 1980); *United States v. Emmons*, 410 U.S. 396, 411 (1973); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955). As the preceding discussion of the language and structure of RICO indicates, the Government simply cannot rely solely on a "plain meaning" interpretation of the term "enterprise." Furthermore, an expansive definition of the term "enterprise" will not necessarily effectuate the remedial purpose of RICO to eliminate the infiltration of racketeers into our business economy. *See* Note, *supra*, 27 De PAUL L. REV. at 97-98. Instead, it will inject federal prosecutors into the realm of offenses traditionally considered to be of a local character.

The organization and content of the entire Organized Crime Control Act confirms our conclusion that congressional intent would be thwarted by permitting the "enterprise" element of the offense to be satisfied in the

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19.

In *United States v. Sutton*, 605 F.2d 260, 266 (6th Cir. 1979), *vacated and submitted for rehearing en banc* April 2, 1980, the majority stated:

> In a passage which the government urges us to follow, the Fifth Circuit describes a "criminal enterprise" as "an amoeba-like infra-structure that controls a secret criminal network." *United States v. Elliott, supra*, 571 F.2d at 897-98. With all due respect, we think greater precision than that is required if the statute is not to violate "the first essential of due process of law" by forbidding "the doing of an act in terms so vague that [persons] of common intelligence [would] necessarily [have to] guess at its meaning and differ as to its application.

manner charged in the indictment against Anderson and Mooney. "[I]t is an established rule, in construing a statute, that the intention of the lawgiver and the meaning of the law are to be ascertained by viewing the whole and every part of the Act." BROOM'S LEGAL MAXIMUS 585*. *See also Phillbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

In Title VIII of the Organized Crime Control Act, Congress carefully included provisions designed to preclude infringement upon local law enforcement officials unless the gambling activity could be considered of sufficient magnitude to warrant federal intervention. 18 U.S.C. §1955 (b) (1) (ii) and (iii), (1976); *McClellan, supra*, 46 NOTRE DAME LAW. at 138. The creation of the RICO offenses does not reflect any awareness of disruption in the balance between federal and state criminal prosecution, yet an expansive definition of the term "enterprise" permits greater and more pervasive intrusion upon state and local law enforcement authority than would federal entry into the isolated area of gambling. The predicate crimes that can establish a pattern of racketeering activity encompass a broad range of criminal acts, and the effective elimination of the "enterprise" element of the offense would permit federal prosecution of any group of individuals associated to commit two to more predicate acts. Thus, Congress's careful solicitude regarding federal-state relations concerning gambling, evident in Title VIII, would effectively be eradicated by an overly broad construction of Title IX, RICO. *United States v. Altese*, 542 F.2d 104, 109 (2d Cir. 1976), (Van Graafeiland, Jr., dissenting), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Moeller*, 402 F. Supp. 49, 59 (D. Conn. 1975); *Atkinson, supra*, 69 J. CRIM. L. & CRIMINOLOGY at 6, *Note, supra*, 27 De PAUL L. REV. at 100-01. We cannot assume Congress was this careless.

Furthermore, we should be wary of any argument that Congress implicitly altered the traditional division of responsibilities between federal and state governments. In *United States v. Bass*, 404 U.S. 336, 349 (1971), the Supreme Court pronounced that

> unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. .....As this Court emphasized only last Term in *Rewis v. United States, supra*, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue the critical matters involved in the judicial decision.

(Footnotes omitted.)

The Government's view of the RICO prosecutions against Anderson and Mooney leads to the conclusion that almost any two criminal acts affecting interstate commerce would fall within the ambit of RICO. Certainly Congress did not silently intend such a drastic reshuffle of the federal-state balance as the expensive theory of the Government would entail.

The relevant legislative history bolsters our interpretation of the definition of a RICO enterprise. Courts reaching a different interpretation of the statute have generally initially determined that the statutory language is unambiguous on its face, and that the plain

meaning of the term "enterprise" admits of no exclusions. *See, e.g., United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied* 429 U.S. 1039 (1977) ("clear, precise and unambiguous language"). On this basis, the Government argues that examination of the legislative history is inappropriate. As we have already illustrated, however, only by ignoring the context of the term can it be considered unambiguous.

Most all courts confronted with defining the scope of RICO have, at least briefly, reviewed the legislative history. The House Report on the Organized Crime Control Act notes that "enterprise" includes "associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of holding a property interest can be reached." H. R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & ADMIN. NEWS 4007, 4032. The reference to infiltration and the use of the word "entities," which denotes that the association must have an existence that is independent, self-contained, separate and distinct, follow from the general legislative purpose regarding RICO. The pertinent history relating to this purpose can be concisely summarized into three basic categories: (1) broad statements emphasizing the need to curb the growth of racketeering; *e.g., Congressional Statement of Findings and Purpose*, Pub. L. 91-452 §1, 84 Stat. 922-23 (1970); *see generally McClellan, supra;* Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 NOTRE DAME LAW. 41 (1970); (2) frequent references to the desire to stop the infiltration of legitimate businesses by organized crime and the absence of any reference to any illegitimate association as an enterprise that would be included within the meaning of that term, see examples

listed in *United States v. Moeller*, 402 F. Supp. 49, 58-59 n.8 (D. Conn. 1975), *Note, supra*, 65 VA. L. REV. at 116 n. 56, and *Note, supra* 124 U. PA. L. REV. at 204-05; [20] and (3) congressional sensitivity to intrusion upon state law enforcement authorities. [21]

Obviously this legislative history does not provide a definitive statement of congressional intent concerning the term "enterprise," but it does help illuminate the intended meaning of the statutory language. It is beyond cavil that the primary purpose of section 1962 was to prevent the infiltration of organized crime into legitimate business enterprises. *Iannelli v. United States*, 420 U.S. 770, 787 n.19 (1975). While legislators recognized that activities not necessarily conducted by organized crime would fall within the proscriptions of the statute, they formulated the statute thusly because of the constraints inherent in defining the prohibited conduct. *See McClellan, supra*, 46 NOTRE DAME LAW. at 142-43. Nevertheless, they remained sensitive to local law enforcement interests, and

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20.

It is impossible to point to any specific congressional refutation of the idea that Title IX applies to illicit businesses. This absence appears to be explained not by congressional uncertainty but by the apparent unanimity of belief that the Act would apply only to infiltration of legitimate business. The Senate Report, the House Report, the Justice Department's recommendation, the concurring view of Senator Scott, the views of the House dissenters, and discussions on the floor of the Senate and House of Representatives before passage of OCCA-70, clearly express an intent limited to attacking organized crime's incursions into legal enterprises.

Note, *supra*, 124 U. PA. L. REV. at 204-05 (footnotes omitted).

21.

See previous discussion of Congress's sensitivity, in formulating gambling prohibitions in Title VIII, regarding federal intervention into criminal matters of primarily local concern.

took care to limit federal intrusion into areas traditionally left to local law enforcement.

The motivating policy of the Act, to free our nation's economic system from the tentacles of organized crime, does not even suggest that Congress intended the definition of an enterprise to encompass a simple association to commit the predicate crimes constituting the pattern of racketeering activity. An expansive definition of the enterprise element of the offense grossly disrupts the balance between federal and state law enforcement efforts, and brings within the ambit of the statute offenses which Congress did not consider sufficiently threatening to our economy to warrant federal intervention. Indeed, the primary purpose of RICO could be displaced. There is no indication that Congress ever intended to grant federal prosecutors the flexibility to pursue relatively minor offenders, having no connection with organized crime, who simply associate to commit two of the predicate crimes.

We hold that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

We recognize that this holding places the Eighth Circuit in direct opposition to the views of the Second, Fifth, Seventh, and Ninth Circuits. *See United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied* 429 U.S. 1039 (1977); *United States v. Elliott*, 571 F.2d 880 (5th

Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, _____ U.S. _____, 63 L.Ed.2d 780 (1980). Although the District of Columbia Circuit has not had occasion to address the possible overbreadth of RICO, in *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979), a panel of that circuit indicated that it would be inclined to adopt the position of broad construction. The Third Circuit has also not directly addressed the issue before us. Although it had indicated concurrence with a broad view of the statute in a different context, *United States v. Frumento*, 563 F.2d 1083, 1089-91 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), its position is not inconsistent with our holding today.[22] The Sixth Circuit is at this writing our sole declared ally. In *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated and submitted for rehearing en banc* April 2, 1980, a panel of that court held that the term "enterprise" encompasses only legitimate associations. We differ from this holding only to the extent that we do not rest our holding on the word "legitimate" but rather on the need for a discrete economic association existing separately from the racketeering activity. *See Bradley, supra*, 65 IOWA L. REV. at 854-55.

22.

The Third Circuit in *Frumento* held that a government agency (Pennsylvania Bureau of Cigarette and Beverage Taxes) falls within RICO's definition of enterprise. 563 F.2d at 1089-91. In *United States v. Sisk*, 476 F. Supp. 1061 (M.D. Tenn. 1979), Judge Merritt, who wrote the *Sutton* majority panel opinion for the Sixth Circuit, found that the enterprise coverage of the statute is not limited to private institutions but also includes governmental agencies, thus adopting the position of the Third Circuit in *Frumento*.

III. Denial of Motion for Severance of Trial

Defendants contend that reversal of their convictions on the RICO counts would remove any conceivable justification for a joint trial, and render the District Court's denial of their motion for severance an abuse of discretion. This argument is not persuasive.

Federal Rule of Criminal Procedure 8(b) provides for consolidation of the proceedings if the defendants were participants "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Aside from the RICO counts, Anderson and Mooney were jointly indicted in Counts XVI, XVII, XIX, XXI, and XXIII. The bogus voucher scheme charged in the indictment was the basis for all the charges against the defendants and indicates that both defendants participated in a closely related series of acts or transactions. It is not necessary that each defendant participated in each act or transaction. *United States v. Wofford*, 562 F.2d 582, 585 (8th Cir. 1977), *cert. denied*, 435 U.S. 916 (1978).

Defendant Mooney argues that he was entitled to a separate trial because of Anderson's felony conviction. He asserts that it was unfair to join him in the mind of the jury with a convicted felon. Separate trials, however, are not necessary simply because the evidence may be more damaging against one of the defendants. *United States v. Williams*, 604 F.2d 1102, 1119 (8th Cir. 1979); *United States v. Fuel*, 583 F.2d 978, 987 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979). Furthermore, the trial court carefully instructed upon the duty to give separate, personal consideration to the case of each individual defendant.

A motion to sever rests within the sound discretion of the trial court, and its judgment will not be reversed absent a showing of clear prejudice indicating an abuse of discretion. *United States v. Brown*, 605 F.2d 389, 393 (8th Cir.), *cert. denied*, _____ U.S. _____, 62 L.Ed.2d 387 (1979); *United States v. Runge*, 593 F.2d 66, 73 (8th Cir.), *cert. denied*, _____ U.S. _____, 62 L.Ed.2d 80 (1979); *United States v. Williams*, 604 F.2d 1102, 1119 (8th Cir. 1979). A careful review of the record reveals no prejudice from the joint trial procedure amounting to an abuse of discretion.

IV. Evidence of Anderson's Felony Conviction

During trial, the Government's key witness, Paul Baldwin, while testifying about an agreement with Anderson and Mooney regarding the bogus sale of pipe, stated that Anderson had said that he needed money in order to appeal a recent conviction. Defendants argue that this evidence was inadmissible and prejudiced Anderson by placing his character in issue. Furthermore, they argue that, even if admissible, the court erred by not properly instructing the jury regarding its limited application.

Federal Rule of Evidence 404 (b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Government argues that evidence that Anderson needed money to pay for an appeal of a criminal conviction is highly probative of motive, intent, plan, or

scheme, and that the evidence completes the story of the transaction alleged in the indictment. The District Court properly recognized the relevance of this information and during the trial instructed the jury accordingly. The trial court also properly exercised its discretion by determining that the prejudicial effect of this evidence did not outweigh its probative value. The evidence was presented in a manner clearly related to explaining the defendants' scheme of conduct. *See United States v. Brown*, 605 F.2d 389, 394 (8th Cir.), *cert. denied*, _____ U.S. _____, 62 L.Ed.2d 387 (1979); *United States v. McMillian*, 535 F.2d 1035, 1039 (8th Cir. 1976), *cert. denied*, 434 U.S. 1074 (1978).

Defendants complain that the court did not offer a limiting instruction at the close of the case, and argue that the instructions made during the case were not sufficient to establish the limited purpose of the testimony. We find that the cautionary instructions given properly restricted the consideration of the evidence. Further, we note that, since neither defendant offered an instruction at the close of the case nor objected to the absence of one, it may not now be assigned as error. FED. R. CRIM. P. 30.

V. Voir Dire

The morning before trial, defendants filed a motion requesting the Government to identify each of its prospective witnesses for the jury, in order to ask if anyone might know or have knowledge about the prospective witnesses. The Government responded that if the court granted this request the same should be required of defendants. The court then required both sides to read their lists of prospective witnesses during the voir dire in order to query jurors regarding their impartiality.

The form and scope of voir dire examination rests primarily in the discretion of the district court, and will constitute error only if an abuse of discretion results in substantial prejudice to the defendant. *United States v. Lewis*, 547 F.2d 1030, 1036 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977). Defendants argue that they were prejudiced by implanting the expectation of the appearance of those witnesses in the minds of the jurors, effectively compelling defendants to present a defense, rather than rest after the Government's case.

Although a better practice would be for the court to read the list of prospective witnesses without identifying whether they may appear on behalf of the prosecution or the defense, we do not perceive that defendants have suffered substantial prejudice in this case. The question of whether any of the jurors are acquainted with the prospective witnesses is clearly important to the question of the jurors' impartiality. *See United States v. Baldwin*, 607 F.2d 1295, 1297-98 (9th Cir. 1979); *United States v. Jackson*, 508 F.2d 1001, 1005-08 (7th Cir. 1975). There is no suggestion that the Government took any advantage by discovering the names of the defense witnesses before they were to testify, and a reading of the record clearly implies that defendants' decisions to testify were motivated by the overwhelming evidence presented by the prosecution.

Defendants also contend that the court abused its discretion in the juror selection process by excusing a prospective juror who was a student scheduled to move into his dormitory on August 16 and begin school on August 19, and by refusing to strike for cause the wife of a maintenance man who worked for the Postal Service. Neither of these actions constituted an abuse of discretion.

"Rulings on juror qualifications will not be interfered with on appeal absent a clear showing of abuse of the sound discretion that is vested in the District Court." *United States v. Young*, 553 F.2d 1132, 1136 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977). The trial commenced on August 13, and the parties estimated that it would take approximately one week to try. Excusing the student cannot possibly be considered an abuse of discretion. The wife of the Postal Service employee, after careful questioning, did not indicate any prejudice or bias. "Unless actual bias is shown the Court's refusal to strike potential jurors will not be deemed a basis for error." *Id.* The implication that her association with the Postal Service would prejudice her in a case charging mail fraud was tenuous, and the District Court did not err in rejecting the presumption of implied bias.

VI. Venue

Lastly, the defendants argue that, in determining venue within a district, the trial court did not exercise proper discretion because it gave insufficient regard to the convenience of the defendants and their witnesses.

Federal Rule of Criminal Procedure 18 requires that in determining the place and prosecution of a criminal trial, the court must give "due regard to the convenience of the defendant and the witnesses." Absent any prejudice to the defense, the decision of the trial court cannot be considered an abuse of discretion. *See United States v. Thiel*, No. 79-1696, slip op. at 3 (8th Cir. April 25, 1980). Although defendants challenge the reasons for denying their motion for change of venue, they do not indicate any manner in which they were prejudiced. The denial of their motion to transfer cannot be considered an abuse of discretion.

VII. Conclusion

The convictions of Anderson and Mooney on Counts I and II of the indictment, charging violations of RICO, are reversed. Defendants' remaining challenges are rejected and their convictions on the remaining counts are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

79-1809 September Term, 1980

United States of America,)
)
Appellee,)
)
vs.)
)
Leslie Anderson,)
)
Appellant.)

Appeals from the United States
District Court for the
No. 79-1827 Eastern District of Arkansas

United States of America,)
)
Appellee,)
)
vs.)
)
Leonard Mooney,)
)
Appellant.)

The Court, having considered joint petition for rehearing and suggestions for rehearing en banc for the appellants, and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Arnold did not participate in the poll for rehearing and suggestions for rehearing en banc.

September 12, 1980

No. 80-766

In the Supreme Court of the United States

OCTOBER TERM, 1980

LESLIE ANDERSON AND LEONARD MOONEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-766

LESLIE ANDERSON AND LEONARD MOONEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that their conduct did not come within the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, and (2) that the reversal of their RICO convictions rendered the initial joinder of their offenses retroactively improper under Fed. R. Crim. P. 8(a) and (b).

1. Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner Anderson was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count I); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count II); four counts of travelling in interstate commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952 and 2 (Counts

V, VI, IX, and XVI); and 16 counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts III, IV, VII, VIII, X-XV, XVII, XIX, XXI, XXIII, XXVII, and XXVIII). Petitioner Mooney was also convicted on the RICO counts and, in addition, on one count of interstate travel in aid of a racketeering enterprise (Count XVI) and 10 counts of mail fraud (Counts XVII-XXVI). Petitioner Anderson was sentenced to concurrrent one-year terms of imprisonment on Counts I, II, III, and V, and was fined $5,000 on Count V. Petitioner Mooney was sentenced to concurrent terms of six months' imprisonment on Counts I, II, XVI, and XVII, and was fined $7,000 on Count XVI. On the remaining counts, the court suspended imposition of sentence and placed both petitioners on probation for two years, to run consecutively to their terms of imprisonment on Count I.

The court of appeals reversed in part and affirmed in part (Pet. App. 1a-36a). It reversed the RICO convictions of both petitioners on the ground (Pet. App. 29a) that the government had failed to establish an "enterprise" consisting of "an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts [of racketeering]." The court affirmed petitioners' convictions on the remaining counts, finding that joinder was proper without regard to the RICO counts and that the district court had not abused its discretion in denying a severance (*id.* at 31a-32a).

2. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 4a-5a). In brief, it showed that petitioners were county administrators in Arkansas who joined in a "kickback" scheme with Paul Baldwin, a construction equipment salesman. Each petitioner received 10 percent of the price of goods purchased by the county from Baldwin. In addition, petitioners approved payment

to Baldwin for equipment that they knew the county had never bought; in return, they received 50 percent of the net amount.

3. Petitioners first note (Pet. 7-10) that a conflict exists among the circuits concerning the scope of the RICO statute. As discussed in our petition for writ of certiorari in *United States* v. *Turkette*, No. 80-808 (filed Nov. 19, 1980),[1] we agree that the courts of appeals are in disagreement on the question whether a group of individuals associated in fact to engage in exclusively illegal activities is an "enterprise" within the meaning of the statute. However, the court of appeals in this case accepted petitioners' contention that the RICO statute was improperly applied to their conduct. In view of the reversal of their RICO convictions, petitioners have no "personal stake" in the question of the proper construction of the term "enterprise." See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Accordingly, there is no occasion to review the issue in this case regardless of the outcome in *Turkette*.

4. Contrary to petitioners' contention (Pet. 10-14), the reversal of their RICO convictions did not result in misjoinder, since there was a valid basis for joinder even in the absence of the RICO counts. Under Fed. R. Crim. P. 8(a), two or more offenses may be charged in the same indictment if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." Similarly, Rule 8(b) provides that the joinder of two or more defendants is proper where "they are alleged to have participated in the * * * same series of acts or transactions constituting an offense or offenses." Here, as the court of appeals correctly held (Pet. App. 31a), all the instances of mail fraud and interstate travel charged in the

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[1]A copy of the *Turkette* petition is being sent to counsel for petitioners.

indictment were part of the same fraudulent scheme involving kickbacks and bogus vouchers. Moreover, apart from the RICO counts, petitioners were jointly indicted in five of the substantive counts (Counts XVI, XVII, XIX, XXI, and XXIII); the fact that only one of the petitioners was charged in each of the other counts does not demonstrate misjoinder, since Rule 8(b) expressly provides that "all of the defendants need not be charged in each count."

United States v. *Sutton*, 605 F. 2d 260 (6th Cir. 1979), and *United States* v. *Turkette*, Nos. 79-1545 and 79-1546 (lst Cir. Sept. 23, 1980), petition for cert. pending, No. 80-808 (filed Nov. 19, 1980), upon which petitioners rely, do not support their position. First, the panel opinion in *Sutton* was vacated when the Sixth Circuit granted rehearing en banc, and the full court has now reversed the panel's decision on the scope of RICO, thereby obviating the joinder issue. See Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (Dec. 3, 1980). But more importantly, the indictment in each of those cases charged two or more separate and distinct sets of offenses, and the appellate court concluded that the RICO counts provided the only basis for joining the otherwise unrelated substantive offenses. Here, by contrast, the court below held that the RICO counts were not necessary to justify joinder under Rule 8, since each count involved "a closely related series of acts or transactions" (Pet. App. 31a).[2]

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[2]In our petition in *Turkette* we argue that, even where the RICO count is the only basis for joinder, reversal on that count does not render the initial joinder improper in the absence of bad faith on the government's part in charging the RICO violation. We also argue that, contrary to petitioners' assertion here (Pet. 10), misjoinder is not "prejudicial per se," but rather is subject to the harmless-error standard of Fed. R. Crim. P. 52(a). Because the joinder in this case was justified wholly apart from the RICO charge, it is not necessary for the Court to hold the instant petition pending disposition of the petition in *Turkette*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

DOJ-1981-01